

MAY 28 2009

REQUEST FOR WITHDRAWAL OF PREMATURE FINAL ACTION

MPEP § 706.07(a) states:

"Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner *introduces a new ground of rejection* that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p)."

MPEP § 706.07(f) (III) (M) states:

"If prosecution is to be reopened after a final Office action has been replied to, the finality of the previous Office action should be withdrawn . . . the Office action should begin with a statement to the effect: 'The finality of the Office action mailed is hereby withdrawn in view of the new ground of rejection set forth below.' Form paragraph 7.42 could be used in addition to this statement. See MPEP 706.07(d)."

The record shows that: (1) the examiner introduced a new ground of rejection; (2) the new ground of rejection was *not* necessitated by amendment of the claims; and (3) the new ground of rejection was *not* necessitated by an information disclosure statement (IDS).

The Office can't make a new rejection against a non amended claim and then make that new rejection final. In order for the new 35 U.S.C. § 103(a) rejection of (at least) non amended claims 1, 37, 38, and 44 based on Drummond/Larkin/Vance to be legally proper, it must first be presented in a non final rejection. This situation has not yet occurred. Newly rejected claim 37 is also an original claim. The final rejection of April 2, 2009 is *prima facie* premature.

The facts show that the rejections are not yet legally ripe for finality. Because of the premature final rejection, Applicants have not been given fair opportunity in accordance with 37 C.F.R. 1.111 to properly rebut the Office's newly imposed ground of rejection. The Office is committing prejudicial error by depriving Applicants of their administrative due process rights (e.g., timely notice of the Examiner's position and opportunity for unhindered response thereto).